

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA,)	
)	
v.)	Docket no. 01-CR-45-B-S
)	
RANDLE L. MORGAN,)	
)	
Defendant)	

ORDER

SINGAL, District Judge

On January 4, 2002, Defendant Randle Morgan pled guilty to one count of receiving child pornography in violation of 18 U.S.C. § 2252A(a)(2). He is currently awaiting sentencing. Presently before the Court is Defendant’s Motion to Withdraw his Guilty Plea on the basis of the Supreme Court’s ruling in Ashcroft v. Free Speech Coalition, ___ U.S. ___, 122 S. Ct. 1389 (2002) (Docket #53). For the following reasons, the Court GRANTS Defendant’s Motion.

I. DISCUSSION

The Court may permit a defendant to withdraw his guilty plea prior to sentencing if he “shows any fair and just reason” for doing so. Fed. R. Crim. P. 32(e). The First Circuit has identified five factors that are relevant to whether a defendant’s reasons justify withdrawal: (1) whether the plea was voluntary, intelligent, and knowing when made; (2) the force of the defendant’s reason for the change of plea; (3) the timing of the request; (4) whether the defendant asserts actual innocence; and (5) whether a plea

agreement had been reached. See United States v. Gonzalez, 202 F.3d 20, 24 (1st Cir. 2000); United States v. Richardson, 225 F.3d 46, 51 (1st Cir. 2000), cert. denied 531 U.S. 1203 (2001). If the Court finds that the Defendant has stated a “fair and just reason” for seeking to withdraw his plea, it must then consider any demonstrable prejudice to the government that would result from his doing so. United States v. Muriel, 111 F.3d 975, 978 (1st Cir. 1997).

A. Voluntariness, Intelligence, and Knowingness

Whether the plea was voluntary, intelligent and knowing is the most significant of the five factors. Richardson, 225 F.3d at 51. The Rule 11 plea colloquy seeks to insure that the plea meets all three of these criteria. See Fed. R. Crim. P. 11(c)-(d). Thus, one of the “core concerns” that the Court must address at the colloquy is whether the defendant understood the charge to which he pled guilty. United States v. Castro-Gomez, 233 F.3d 684, 687 (1st Cir. 2000).

Defendant pled guilty to one count of receiving child pornography in violation of 18 U.S.C. § 2252A(a)(2). At the time of his plea, “child pornography” included visual depictions of four types:

- (A) [where] the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
- (B) [where] such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
- (C) [where] such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
- (D) [where] such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a

visual depiction of a minor engaging in sexually explicit conduct.

18 U.S.C. § 2256(8). At his Rule 11 colloquy on January 4, 2002, Defendant stated that he had reviewed the statutory requirements for the offense of receiving child pornography with his attorney, and his attorney assured the Court that Defendant understood the definition of “child pornography.” (See Tr. at 8-9 (Docket #58).) Based on this understanding of the offense, defense counsel conceded that the government’s evidence was sufficient to establish Defendant’s guilt beyond a reasonable doubt. (See Tr. at 13.)

On April 16, 2002, the Supreme Court held that two of the four categories of material in the definition of child pornography on which Defendant relied were constitutionally overbroad. Ashcroft, 122 S. Ct. at 1406. It struck down section 2256(8)(B) (depictions that *appear* to be minors engaging in sexually explicit conduct) and section 2256(8)(D) (depictions that are *advertised or promoted* as minors engaging in sexually explicit conduct) because they were written broadly enough to include and criminalize constitutionally protected speech. Id. Thus, at the time of his plea, Defendant mistakenly understood the charged offense to encompass conduct that Congress cannot constitutionally prohibit. As a result, Defendant was not properly informed about the nature of the charges against him, which counsels strongly in favor of allowing him to withdraw his plea. See United States v. Abernathy, 83 F.3d 17, 19 (1st Cir. 1996) (allowing defendant to withdraw his plea after sentencing because he had not been advised properly as to the elements of the charged offense).

B. Other Factors

1. Force of Defendant's Reason for Seeking the Change

Defendant seeks to change his plea because the Supreme Court has struck down portions of the statute under which he pled, which compromised the intelligence of his decision. This reason is a forceful one. See United States v. Hoyle, 237 F.3d 1, 7 (1st Cir. 2001), cert. denied ___ U.S. ___, 122 S. Ct. 343 (2001) (observing that because “[u]nderstanding the charge is one of Rule 11’s core concerns ... violation thereof mandates that the plea be set aside.”).

2. Timing of Defendant's Request

When a defendant moves to withdraw based on knowledge he gained after the plea, “the relevant temporal gap is ... the time between his discovery of the new information and the filing of his motion.” Gonzalez, 202 F.3d at 24. “[T]he more a request is delayed ... the more [courts] will regard it with disfavor.” United States v. Isom, 85 F.3d 831, 838 (1st Cir. 1996). Defendant filed a motion to withdraw his plea seven days after the Supreme Court issued the decision on which his Motion relies. Seven days is a perfectly reasonable amount of time in which to become aware of a new Supreme Court opinion and prepare a memorandum of law; it suggests no unnecessary delay on Defendant’s part.

3. Claim of Actual Innocence

“[T]he lack of a claim of innocence weighs in favor of sustaining a guilty plea.” Muriel, 111 F.3d at 980. Defendant does not claim that he is actually innocent of the

crime of receiving child pornography. He has not repudiated his earlier admission that he received the images in question, and he does not claim that the images fall within either of the definitions of “child pornography” that the Supreme Court invalidated. See 18 U.S.C. § 2256(8)(B), (D).

However, after Ashcroft, the government bears the additional burden in child pornography prosecutions of proving that the images involve actual children. See 18 U.S.C. § 2256(8)(A), (C). Given the necessary swiftness with which Defendant moved to withdraw his plea, Defendant himself may not have had time to determine whether the images are of actual children. Therefore, it is not unreasonable to allow him the opportunity to reassess whether the government will be able to meet its burden, and it is not fatal to his Motion that he has not asserted a claim of actual innocence.

4. Existence of a Plea Agreement

The fifth factor, whether a plea agreement had been reached, works neither to Defendant’s benefit nor to his detriment. The parties signed an agreement whereby Defendant agreed to plead guilty to Count Two of the indictment against him (receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2)) in exchange for the government’s dismissing Count One (possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B)). (See Agreement to Plead Guilty (Docket #49).) However, Defendant was equally misinformed about the nature of the charged crime at the time he signed the plea agreement as he was at the time of the colloquy. Thus, the existence of a plea agreement contributes little to the analysis of whether Defendant’s plea was voluntary, intelligent, and knowing.

C. Prejudice to the Government

Based on the five factors discussed above, the Court concludes that Defendant has a fair and just reason for seeking to withdraw his plea. Therefore, the Court must consider the prejudice that the government would suffer if he is allowed to do so. See Muriel, 111 F.3d at 978. If Defendant is permitted to withdraw his plea, the government will have to invest additional resources in order to continue prosecuting him. Beyond that, there is nothing to indicate that withdrawing the plea will prejudice the government in any extraordinary fashion. That the government will be forced to carry on a prosecution, standing alone, does not provide a basis for refusing to allow Defendant to withdraw his plea.

II. CONCLUSION

Therefore, the Court GRANTS Defendant's Motion, and the guilty plea he entered on January 4, 2002, is WITHDRAWN.

SO ORDERED.

GEORGE Z SINGAL
United States District Judge

Dated this 10th day of May, 2002.

RANDLE MORGAN
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